Supreme Court, U.S.
FILED
JUN 8 2000
CLERK

(5)

No. 99-1728

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FREDERICK W. VOPPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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One of this Court's most important roles is "to review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965). The Court has performed that role not only when a lower court invalidates a federal statute on its face, but also when the statute is held to be unconstitutional as applied. See, *e.g.*, *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 421-423 (1993) (reviewing court of appeals decision holding federal gambling advertising law unconstitutional "as applied to respondent"). In this case, the court of appeals held that two basic provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 violate the First Amendment with respect to a broad and important class of applications. That decision warrants review.

1. Seeking to avoid further review, respondents contend that the Third Circuit's decision constitutes a "fact-bound" application of settled First Amendment principles to "the unique facts of this case." Vopper Br. in Opp. i, 4; see Yocum Br. in Opp. 5-6. The Third Circuit's own opinion disposes of that argument. The Third Circuit framed its holding in the following terms:

> We * * * hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.

Pet. App. 42a.

There is nothing remotely fact-bound about that holding. Title III expressly prohibits the disclosure and use of illegally intercepted communications by any person who knows or has reason to know that the communications were intercepted in violation of Title III. 18 U.S.C. 2511(1)(c) and (d). Under the Third Circuit's holding, Section 2511(1)(c) and (d) may not be applied to anyone other than the wiretapper himself, even when the communication is disclosed or used with full knowledge of its illegal provenance, unless the person who discloses or uses the communication "participated in or encouraged" the interception. The breadth of that holding reaches far beyond the facts of this case.

Nor does it matter (Vopper Br. in Opp. 10) that, at several points in its opinion, the court of appeals specifically addressed the disclosure or use of intercepted communications concerning matters of "public significance." See, *e.g.*, Pet. App. 2a. Even if the decision were explicitly confined to cases involving matters of "public significance," the breadth and import of the

decision would be largely unchanged. As a practical matter, it is information of public significance that is most likely to be passed from a wiretapper to third parties and, as in this case, to be publicly disclosed or otherwise used in violation of Section 2511(1)(c) and (d). Indeed, this case and *Boehner* v. *McDermott*, 191 F.3d 463 (D.C. Cir. 1999), petition for cert. pending, No. 99-1709, both concern the application of Section 2511(1)(c) with respect to communications on matters of public import. Cases involving the use and disclosure of communications that are not of public concern, such as communications between patients and their doctors (Vopper Br. in Opp. 12 n.7), in contrast, promise to be relatively more infrequent, since such communications, once intercepted, are unlikely to be disclosed by the wiretapper or be published by the media.

The constitutional reasoning underlying the Third Circuit's decision, moreover, can hardly be considered fact-bound. The decision below rests chiefly on two determinations by the court of appeals. The first is that the government has not shown that prohibiting the disclosure and use of illegally intercepted communications materially deters electronic surveillance in the first instance. Pet. App. 33a-35a. The second is that, even though Section 2511(1)(c) and (d) proscribes disclosure and use of illegally intercepted communications only by persons who know or have reason to know of the communication's illegal provenance, it may deter the news media from publishing material that is *not* the product of illegal surveillance. *Id.* at 36a-37a. We have summarized the shortcomings of that reasoning in our petition. Pet. 13-15. What bears note here is that the court of appeals' reasoning is not tied to the particular facts of this case. Instead, its reasoning applies with equal force (or lack of force) to any case in which

Section 2511(1)(c) and (d) is applied to the disclosure or use of illegally intercepted communications of public significance by persons who did not participate in the interception.[1]

Moreover, by its terms, the Third Circuit's decision applies not only to Title III, but also to the corresponding provisions of the Pennsylvania electronic surveillance statute. And as explained in our petition, the court's reasoning is equally applicable to the electronic surveillance laws of numerous other States. Even with respect to Title III alone, the decision has serious practical implications for new and rapidly expanding private communications technologies like wireless telephones and the Internet, which are relatively vulnerable to electronic surveillance and therefore are in particular need of the additional protection that Section 2511(1)(c) and (d) provides. See Pet. 19-20 & n.9. Respondents' submission does nothing to dispel the practical, as well as doctrinal, significance of the decision below.

2. As explained in our petition, the decision below is also inconsistent with *Boehner* v. *McDermott*, *supra*, in which the D.C. Circuit rejected a virtually indistinguishable First Amendment challenge to the constitutionality of 18 U.S.C. 2511(1)(c) and a parallel Florida statute. See Pet. 16-17. Respondents' effort to distinguish *Boehner* (Vopper Br. in Opp. 15-21) is unsuccessful.

[1] When the constitutionality of an Act of Congress is called into question in private litigation, federal courts not only must notify the Attorney General and permit the United States to intervene in defense of the statute, but also must afford the United States the opportunity to make a "presentation of evidence" on the constitutional issue. 28 U.S.C. 2403(a). In this case, however, the United States did not have that opportunity, because it did not receive notice of the constitutional challenge to Title III until after the oral argument in the court of appeals. See Pet. 6. Thus, even assuming *arguendo* that an evidentiary showing were required to vindicate the challenged provisions of Title III, the court of appeals erred in invalidating those provisions without giving the United States the opportunity to provide such support. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664-668 (1994).

Although the statutory claims in this case are broader in some respects than the claims in *Boehner*, both cases include claims under 18 U.S.C. 2511(1)(c) against individuals who did not participate in the initial illegal interception of the communication, but who received a recording of the intercepted conversation and conveyed it to the news media with (according to the allegations in the complaints) knowledge or reason to know that the information was obtained in violation of Title III. In *Boehner*, the D.C. Circuit held that the application of Section 2511(1)(c) to such an individual does not violate the First Amendment. In this case, in direct contrast, the Third Circuit held that the application of Section 2511(1)(c) to such an individual (as well as to the news media) does violate the First Amendment.

Respondents argue at length that the two cases are factually distinguishable because the defendant in *Boehner* (Rep. McDermott) received the recording in circumstances that put him on notice that the recording was the fruit of an illegal interception and that the wiretappers allegedly "expected something of value in return" (immunity from prosecution). Vopper Br. in Opp. 18. Those factual distinctions have no statutory or constitutional significance. In statutory terms, 18 U.S.C. 2511(1)(c) and (d) imposes liability on those who use or disclose the contents of an intercepted communication with knowledge that it was unlawfully obtained. The statute thus renders the defendant liable if he knows of the communication's unlawful origin *at the*

time of the use or disclosure, without regard to the defendant's knowledge or conduct at the time he received it. For purposes of the statute, respondents' and McDermott's actions are therefore indistinguishable. The complaints in their respective cases both allege that they violated the statutory prohibition on disclosure of intercepted information because they knew or had reason to know of the information's illegal origin at the time they disclosed it, while neither defendant violated (and neither participated in or encouraged the violation of) the underlying prohibition on unauthorized surveillance itself.

Similarly, as a constitutional matter, there is no reason why the constitutionality of applying Section 2511(1)(c) to a particular defendant should turn on whether the wiretapper conveys illegally intercepted communications to the defendant in person or anonymously, or on whether the wiretapper acts under the mistaken impression (or simply the unilateral hope) that the defendant will provide a *quid pro quo*. Nor does the court of appeals' holding in this case—that Title III "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception," Pet. App. 42a—recognize such a distinction. In *Boehner* v. *McDermott*, as here, the defendant "use[d] or disclos[ed]" an unlawfully intercepted communication but neither "participated in [n]or encouraged the interception." In *Boehner*, the application of Title III was upheld; in this case, in contrast, it was held unconstitutional.

At a more basic level, respondents ignore the extent to which the reasoning of the two cases is inconsistent. For example, the decision in this case rests in large

measure on the Third Circuit's skepticism that prohibiting the disclosure and use of illegally intercepted communications by third parties materially strengthens the underlying prohibition on electronic surveillance. See Pet. App. 33a-35a, 41a. In contrast, the D.C. Circuit regarded it as self-evident that prohibiting the disclosure of illegally intercepted information by third parties contributes to the goal of deterring illegal wiretapping by reducing the incentive for such activity. See *Boehner*, 191 F.3d at 469-470, 478.[2] See also *id.* at 471 (invalidation of Section 2511(1)(c) would "render[] the government powerless to prevent disclosure of private information" because criminals can "launder" illegally intercepted communications) (internal quotation marks omitted).[3]

In short, the two decisions take fundamentally disparate approaches to the First Amendment issues in this case and reached contrary results on consti-

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[2] Indeed, it was for that very reason that the dissent in this case quoted extensively from *Boehner*. See Pet. App. 50a-51a (Pollack, J., dissenting) (quoting *Boehner*, 191 F.3d at 470).

[3] The decisions are similarly at odds regarding the government's interest in protecting against the loss of privacy that occurs when illegally intercepted communications are disclosed following their interception. The Third Circuit acknowledged that "the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest," but mistakenly regarded the interest as a "content-based" one that cannot be taken into account for purposes of intermediate scrutiny under the First Amendment. See Pet. App. 26a-27a. In contrast, the D.C. Circuit treated the government's interest in protecting privacy by prohibiting disclosure of intercepted communications as a "substantial governmental interest unrelated to the suppression of free expression," and hence one that is properly cognizable under intermediate scrutiny. *Boehner*, 191 F.3d at 468 (internal quotation marks omitted).

tutionally indistinguishable facts. For that reason, too, certiorari should be granted.

3. As explained in our petition, this case presents the question this Court expressly reserved in *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989): whether, and in what circumstances, the government constitutionally may prohibit the dissemination of information that comes from a source who obtained the information illegally. See *id.* at 535 n.8 ("We have no occasion to address" the question "whether, in cases where information has been *acquired unlawfully* by a newspaper or *by a source*, government may ever punish not only the unlawful acquisition, but *the ensuing publication* as well.") (emphases added). The ruling of the court of appeals addresses precisely that issue, holding that Title III may not constitutionally be applied to prohibit the disclosure (or other use) of illegally intercepted information by persons who did not themselves participate in or encourage the interception. Pet. App. 42a.

Respondents assert that the question reserved in *Florida Star* is not presented in this case. See Vopper Br. in Opp. 5-7. That assertion reflects a basic misunderstanding of the Third Circuit's treatment of *Florida Star*. See Pet. App. 10a-14a. Respondents correctly point out that the Third Circuit declined to decide whether the challenged provisions of Title III would satisfy the strict scrutiny test employed in *Florida Star* itself. Vopper Br. in Opp. 6. The Third Circuit did so, however, precisely because it concluded that this case is not governed by the holding in *Florida Star*, but rather concerned the issue *Florida Star* reserved—whether and to what extent it is permissible to impose liability for the publication of information that a source obtained unlawfully. See Pet. App. 13a. Moreover, defending the judgment, respondents argue

(Vopper Br. in Opp. 7 n.3) that the court of appeals *erred* by failing to apply strict scrutiny, notwithstanding *Florida Star*'s reservation of the issue. Compare *Boehner*, 191 F.3d at 480 (Sentelle, J., dissenting) (applying strict scrutiny). The level of scrutiny to be applied, of course, is a critical issue in this case, as is the proper application of that level of scrutiny to the use and disclosure prohibitions that Congress found necessary to the protection of privacy when it enacted Title III.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2000